Collectramatic, Inc. *and* Local Union No. 107, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada AFL-CIO. Cases 9-CA-7369 and 9-RC-13890

26 August 1983

DECISION AND ORDER

BY CHAIRMAN VAN DE WATER AND MEMBERS JENKINS AND ZIMMERMAN

On 4 February 1983 Administrative Law Judge Robert A. Giannasi issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and brief and has decided to affirm the rulings, findings,[1] and conclusions[2] of the Administrative Law Judge and to adopt his recommended Order, as modified herein.[3]

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge, as modified below, and hereby orders that the Respondent, Collectramatic, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for the last paragraph of the Administrative Law Judge's recommended Order:

"IT IS FURTHER ORDERED that Case 9-RC-13890 be, and it hereby is, remanded to the Regional Director for Region 9 for the purpose of opening and counting the ballots of Danny Phillips, Dennis Mullins, Mike Logsdon, Donald Smith, Larry Melcher, and Mark Snelling and, thereafter, preparing and causing to be served on the parties a revised tally of ballots on the basis of which he shall issue an appropriate certification."

2. Substitute the attached notice for that of the Administrative Law Judge.

CHAIRMAN DOTSON, dissenting in part and concurring in part:

Although I agree with the findings of my colleagues in most respects, I do not agree that Respondent violated Section 8(a)(1) of the Act by installing a telephone in the breakroom. Although employees had enjoyed use of the phone in the past, at some point it was removed because of employee abuse. I do not consider reinstallation of the phone as a significant benefit that would tend to interfere with, restrain, or coerce employees in the exercise of Section 7 rights. I would dismiss this allegation of the complaint.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

After a hearing at which all sides had an opportunity to present evidence and state their positions, the National Labor Relations Board found that we

[1] Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all of the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

Respondent correctly asserts in its exceptions that there is no direct evidence to support the Administrative Law Judge's finding that Respondent knew that discharged employee Larry Melcher is the son of Del Melcher, Jr., the union business representative who conducted the first two union meetings and transmitted the Union's 26 August 1981 bargaining request. The record does support however the Administrative Law Judge's further findings that the evidence contravenes Respondent's assertions that Melcher was selected because he lacked experience or was a poor employee. In addition, in light of the fact that the Administrative Law Judge's 8(a)(3) finding was based on several factors, including Respondent's clear union animus, the timing of the discharges, and the weakness of Respondent's economic defense, we find that a preponderance of evidence in the record supports the finding that the employees, including Larry Melcher, were discharged in order to discourage them from seeking union representation. *Majestic Molded Products v. NLRB*, 330 F.2d 603 (2d Cir. 1964).

In the statement of the case, the Administrative Law Judge erroneously stated that the Union lost the 10 December 1981 election. In light of the pending challenged ballots of the six discriminatees, the outcome of the election will not be determined until the Regional Director has counted the challenged ballots and issued a revised tally of votes.

We also note that employee Dennis Mullins' name is misspelled in the trial transcript and the Administrative Law Judge's Decision to read "Mullens." We find that documentary evidence submitted by the General Counsel and Respondent establish the correct spelling of Mullins' name.

[2] Member Jenkins agrees that Respondent violated Sec. 8(a)(1) by soliciting complaints with the implication that they would be resolved without the need for a union, but does so for reasons set forth in his dissenting opinion in *Varco Inc.*, 216 NLRB 1 (1974).

[3] We have modified the last paragraph of the Administrative Law Judge's recommended Order to provide that Case 9-RC-13890 be remanded to the Regional Director for Region 9 for the purpose of opening and counting of the challenged ballots, and, thereafter, preparing and causing to be served on the parties a revised tally of ballots on the basis of which he shall issue an appropriate certification. See, generally, *Joe & Dodie's Taven*, 254 NLRB 401 (1981).

We are of the opinion that the policies of the Act will best be effectuated if the notice which Respondent is required to sign and post also includes an introductory paragraph explaining to employees their rights under the Act, and by what process their rights have been upheld.

have violated the National Labor Relations Act, as amended, and has ordered us to post this notice.

The Act gives employees the following rights:

To engage in self-organization

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To engage in activities together for the purpose of collective bargaining or other mutual aid or protection

To refrain from the exercise of any or all such activities.

WE WILL NOT discharge, discipline, or otherwise discriminate against employees in regard to their hire or tenure of employment or any term or condition thereof because they engage in union activities or in order to discourage union activities.

WE WILL NOT interrogate employees concerning their union activities or those of other employees.

WE WILL NOT announce promises of benefits in order to discourage union activities.

WE WILL NOT solicit complaints with the implication that they would be resolved without the need for a union.

WE WILL NOT threaten employees with reprisals if they select or support a union.

WE WILL NOT create the impression that the union activities of our employees are under surveillance.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of their Section 7 rights.

WE WILL offer to Danny Phillips, Dennis Mullins, Mike Logsdon, Donald Smith, Larry Melcher, and Mark Snelling full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges previously enjoyed, and make them whole for any loss of earnings or benefits they have suffered as a result of their unlawful discharges, including interest.

WE WILL expunge from our files any reference to the discharges of the employees mentioned above and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

COLLECTRAMATIC, INC.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge: This case was tried on July 26 and 27, 1982, in Louisville, Kentucky. The complaint in Case 9-CA-17369, as amended at the hearing, alleges that Respondent violated Section 8(a)(1) of the Act by various acts of coercion and violated Section 8(a)(3) and (1) of the Act by discriminatorily discharging or laying off six employees because of their union activities. The above case was consolidated with Case 9-RC-13890 in which the Charging Party Union (hereafter the Union) filed an election petition seeking representation rights for Respondent's production and maintenance employees. The Union lost the election, which was held on December 10, 1981, by a margin of 19 to 16, but the ballots of the six alleged discriminatees were challenged and uncounted. These challenges turn on the question of whether the employees were properly discharged. Respondent denied the essential allegations of the complaint and seeks to have the representation case dismissed. Both parties filed briefs.

Upon the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a Kentucky corporation with an office and place of business in Louisville, Kentucky, is engaged in the manufacture of fast food equipment. During a representative 12-month period, Respondent sold and shipped from its Louisville, Kentucky, facility, products, goods, and materials valued in excess of $50,000 directly to points outside the Commonwealth of Kentucky. Accordingly, I find, as Respondent admits, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION

The Union is a labor organization within the meaning of Section 2(5) of the Act.

III. THE UNFAIR LABOR PRACTICES

A. *The Facts*

In the summer of 1981, Larry Melcher, an employee in Respondent's welding department, contacted his father, a business representative for the union, about organizing Respondent's employees. The senior Melcher met with a group of about 25 employees at a bait or liquor store near Respondent's facility. Plans were made for a second meeting which was held on Wednesday, August 26, 1981, at the Union's hall. About 40 of Respondent's 49 nonsupervisory shop employees were present at this meeting. Many of the employees signed cards authorizing the Union to represent them.

Immediately after the August 26 meeting, Business Representative Melcher sent telegrams to two management officials of Respondent asserting that the Union

represented a majority of the employees and requesting recognition. The telegrams were delivered on August 27, 1981. Vice President Eugene Pottinger was notified by telephone of the telegram to him at 8:46 a.m. He refused to accept delivery of the written telegram. Pottinger also refused to accept the telephone call notification of a similar telegram to President Winston Shelton, represented that Shelton would be out of town until the next week, and asked that the telegram not be delivered.

On August 21, the day after the first union meeting, employee Danny Phillips was approached by his supervisor in the polishing department, Tim Hazelwood. Hazelwood told Phillips, "we know all of you guys are up there meeting at the liquor store . . . it wouldn't do you guys any good because it wouldn't take Shelton but a minute to lock the doors and shut down the plant and move to Florida if you try to get a union in."[1]

On August 27, 1981, the date after the second union meeting and the very day the Union's bargaining request was received by Respondent, Manufacturing Manager Denny Hall spoke to employee Jim Carney and ascertained that there was some talk among employees about a union. Hall directed that Carney accompany him to Hall's office. When they were in his office, Hall asked who was responsible for beginning the organizational activity. Carney said he did not know. Hall then said that he thought the instigator might be one of the newer employees. According to Carney, Hall also said "the company couldn't run with people like Jimmy Hoffa subject or whatever" and that he wanted to find out what the employees' problems were.[2]

After Carney left Hall's office, his supervisor, Jim Jenkins, asked him where he had been for the past 30 minutes. Carney told him and also mentioned what he had been talking about. According to Carney, Jenkins said that "Mr. Shelton had, of course, he made his million that—that he wasn't going to let a union come through the door and that I was putting him and a whole lot of people out of a job."

In the morning hours of August 28, several supervisors spoke to employees about the Union. Uncontradicted testimony establishes that Supervisor David Black approached employee Mark Smith and asked "what was going on Wednesday night"—the day of the second union meeting. He also asked if Smith had attended the meeting and what had happened. Smith admitted he had attended, after initially stating he did not know anything about it, and he also stated that "nothing" happened at the meeting.

The same day, according to uncontradicted testimony, Hall approached employee Robert Gaddie outside the plant building at morning break and asked if he knew who "had anything to do with having the union started." Gaddie said he did not know. Hall replied that if he found out he would "kick their ass."

At or about 3:15 p.m., August 28, President Winston Shelton called a meeting of all of the employees. At the meeting, Shelton announced that he had "good news and bad news." He advised the employees that a telephone was to be reinstalled in the break area. The telephone had been removed some time before because its use had been abused by employees. Shelton then proceeded with the bad news. He said there was a decrease in sales and that there was to be a layoff of six employees in what he termed a "spring house cleaning." He said that the employees were not suited for Respondent and would not be recalled. He also said that the employees were selected based on work ability and attendance records.[3]

Immediately after the meeting, four of the six terminated employees were notified by their supervisors of their selection for termination and directed to Hall's office where they met with Hall and their supervisors. Two of the six, Danny Phillips and Dennis Mullens, were absent on August 28 and were notified later of their terminations. All the employees asked and were told by management officials why they were selected for termination.

Mike Logsdon had worked for Respondent since April 27, 1978, and he spent 2 years in the assembly department. He transferred to the machine shop and had been working there for 5 weeks when he was terminated. He attended the second union meeting and signed a union card at that time. Logsdon was told by his foreman that he was selected for termination because he had the lowest seniority in his department. Logsdon protested that he had considerable experience in other departments. He had been working for Respondent for over 4 years. Hall then told him he had a bad attendance record. Actually, on August 10, Logsdon received a merit raise of 55 cents per hour. After that date he had two absences, one of which was excused. He was never warned about his absenteeism although he did receive one oral warning for tardiness.

Donald Smith began working for Respondent in December 1980 and he was working in the polishing and electropolishing departments at the time of his termination. On July 28, 1981, he received a merit raise of 55 cents per hour. He attended the second union meeting and signed a union authorization card. After the Shelton meeting, Smith's foreman, Tim Hazelwood, told him that he had been chosen for layoff. Smith asked why he was chosen and Hazelwood responded that "I didn't choose you. Denny Hall did." Later, Hall told Smith he had been chosen for termination because he was the junior person in the electropolishing department and that he

[1] This testimony was uncontradicted and not assailed on cross-examination. Some initial confusion on the date of the conversation was clarified by Phillips' answer to a specific question and by the remainder of his testimony.

[2] There is no controversy over the contents of this conversation. Carney placed the conversation on August 28, the day after the layoff. However, when Hall first testified—prior to Carney's testimony—he placed the conversation on August 27, the day before the layoffs. This was consistent with Hall's pretrial affidavit. After Carney's testimony, Hall attempted to change his testimony to conform with Carney's. After being shown his pretrial affidavit, Hall reluctantly conceded that his recollection was better when he gave the affidavit, 1 month after the event, than it was at the time of the hearing. Hall also conceded that he knew of the phone call which transmitted the Union's bargaining request to Vice President Pottinger. I find, therefore, that the conversation took place on August 27 and it took place after Hall had learned that the Union had made a bargaining request through employee Melcher's father.

[3] The above is based on the uncontradicted testimony of four employees who attended the meeting. Only one of the four employees testified that Shelton mentioned declining sales in his speech. Shelton did not testify.

was "accident prone." Actually, Smith also worked in the polishing department and there were two employees more junior than him in that department. As for accidents, Smith had suffered one accident at work and he was absent for 2 weeks as a result. On another occasion he suffered a nonwork injury which resulted in no loss of work but caused him to perform light duties for 3 days. These incidents predated Smith's July 28 raise.

Larry Melcher had begun work in the welding department in March 1981, the same day as another employee. He had, of course, initiated the contact with the Union and his father was the Union's business representative, a fact which obviously must have been known by Respondent when it received the Union's bargaining demand. Melcher signed a union authorization card and attended both union meetings. Melcher was told by his supervisor that he was selected for termination because his welding skills were insufficient. Melcher had never received any warnings about his job performance. He had taken 2 years of vocational training in welding and had received good grades. Two months before he was fired he had received a raise. At that point—after 90 days of employment—Respondent either dismissed employees, gave them a raise, or extended their probationary period without a raise.

Mark Snelling, a punch and shear department employee since March 1981, also received a raise after the end of his 90-day probationary period. He attended both union meetings and signed a union card. He had received no warnings criticizing his job performance. He was told, however, by his supervisor that he was selected for termination because of his "lack of skills." His supervisor also told him that his attendance record was satisfactory and that his attitude was good.

Employee Mullens, who was on disability leave due to a job-related back injury, was told by Foreman John Zimlich that he was terminated because he had the worst record in his department, the assembly department. Zimlich did not elaborate on the reasons for his selection for termination. Mullens had signed a union card before his termination.

Employee Phillips, a polishing department employee who had missed work on August 28 because of a court appearance, had attended both union meetings and signed a union card. He spoke to Hall about his termination. Hall told him he was selected for termination because of his attendance. Hall also said there was a chance that he would be recalled "if things picked back up." Hall also said that Phillips was a good worker. Phillips had received a raise of 70 cents per hour on June 22, 1981. The notation on the form approving the raise, which was signed by Hall, indicated that Phillips "has assumed leader responsibilities." Phillips in fact was recommended by Supervisors Tim Hazelwood to be the leadman in the polishing department.[4]

After the layoffs and before the December 10, 1981, election, officials of Respondent continued to speak to employees about the Union. The following is based on uncontradicted testimony.

About a week or two after the terminations, Hall approached employee Gaddie and asked him if Larry Melcher had anything to do with bringing the Union into the plant. Gaddie said he did not think so. According to Gaddie, Hall also said that "if the union was brought in . . . they would just close the doors, he'd buy me a pair of swimming trunks and take me to Florida."

In early September 1981, Shelton approached employee Gaddie at his work station and, after engaging in some small talk, asked him why employees were supporting a union. He also asked if Gaddie knew of anything he could do "to change the ways it was going over there." Gaddie replied he did not know what Shelton could do. Shelton approached other employees at their work stations and engaged them in conversation at this time.

On several occasions in September, employee Mark Smith heard Supervisor Robert Medford state that Shelton would "shut down the plant before he would ever deal with the union."

In a September 1981 meeting with employees, Shelton told them that if a union came into the plant they would be unable to go to him personally to ask for a raise. According to employee Robert Helton, Shelton said, "we would always have to be [sic] through a union steward."

According to the uncontradicted testimony of employee Helton, beginning a few weeks after the terminations, he and other employees in the polishing department were asked "quite a few times" to work overtime. He testified he was asked about every week to work overtime—"eight hours over on Fridays and two hours at nights a few times."[5] Helton also testified that an employee was transferred into the electropolishing department after the terminations and he, Helton, was transferred from the polishing department to the welding department at the beginning of 1982. Helton did "very litle" welding and had "very little" training in the welding department. He quit Respondent's employ in March 1982.

Employee Wayne Aubrey, a present employee of Respondent, testified without contradiction that he was transferred from the machine shop to the welding department in August 1981 and was asked to work overtime by the welding foreman beginning on September 11, 1981. He and other welding department employees were asked to work overtime in September 1981 after the layoffs.

During March 1982, the plant was shut down and all employees were laid off for a 2-week period. All employees returned to work thereafter. There have been no other layoffs in the past 2 years.

Respondent also hired seven new employees sometime in 1982 in various departments. One employee was hired

[4] The above is based on the testimony of Phillips and documentary evidence. Hazelwood did not testify. Hall was very evasive in testifying about Phillips' responsibilities and I view with extreme skepticism all of his testimony concerning Phillips and the reasons for the selection of Phillips for termination.

[5] Respondent works a 4-day 10-hour-per day workweek and Friday is an overtime day.

on January 12, 1982, in the punch and shear department and he quit on March 23, 1982.[6]

B. *Discussion and Analysis*

1. The 8(a)(1) violations

The General Counsel made a number of specific allegations that Respondent had violated Section 8(a)(1) of the Act. The testimony in support of these allegations was essentially uncontradicted since none of the management officials who allegedly committed the violations testified, except for Hall who testified concerning only one incident.

President Shelton, in his announcement of August 28 that telephone privileges would be restored, promised a benefit to employees in order to discourage them from selecting the Union as their bargaining representative. The timing of the announcement, 1 day after the bargaining request, as well as the absence of any evidence or suggestion that the promise was based on any business reason unrelated to the Union's bargaining request, establishes the violation.

The evidence also shows that Shelton approached employee Gaddie and asked why employees supported the Union and what he could do to improve conditions. He also approached other employees on this occasion. Such solicitation of complaints clearly implies that Respondent would correct problems without the need for a union and is thus unlawful.

The evidence also shows that Shelton told employees that the onset of a union would result in impairment of the ability of employees to deal directly with Respondent over raises and that they would have to deal through a union steward. Although, in some circumstances, a statement that the onset of a union would cause a change in the relationship between an employer and employee may be unlawful because it suggests a change brought about by the employer himself as a punishment for support of a union, I do not read Shelton's remarks in this manner. First of all, the testimony in support of this allegation was sketchy and devoid of context. Secondly, the suggestion that a union would play the role of an exclusive bargaining representative and that an employer could not take action on working conditions without consulting a union is generally accurate. Nor do I read any threat of retaliation in Shelton's remarks. I shall therefore dismiss this allegation of the complaint.

The General Counsel also alleges that Shelton violated the Act by telling employees that Respondent would close its doors if the employees selected the Union. I was unable to find anything in the record to support this allegation and counsel for the General Counsel cited no evidence on this point in her brief. I shall therefore dismiss this allegation of the complaint.

The evidence shows that Hall coercively interrogated three employees about union activities. One such interrogation—with employee Carney—took place in Hall's office, the locus of authority. Hall did not have a good reason for such interrogation and did not assure employees there would be no reprisals against employees for their responses. Such interrogation is thus unlawful. However, I do not find any evidence that Hall created the impression of surveillance in his conversation with Gaddie on August 28, as alleged by the General Counsel.[7]

The General Counsel also alleges that Hall unlawfully solicited employee grievances with the implicit promise that they would be resolved if employees rejected a union. The evidence shows that, in his conversation with Carney, Hall indicated he wanted to find out what the employees' problems were. In the context of the conversation, which contained coercive interrogations, it is a fair implication that Hall sought to find out employees' problems in an attempt to resolve them in order to remove the need for a union. Indeed, the next day, Shelton announced a benefit which was clearly timed to halt the Union's drive to organize employees and Shelton himself undertook the same kind of solicitation on another occasion. Accordingly, Hall's remarks constituted a violation of the Act.

The evidence also shows that Hall told employees on separate occasions that if he found out who initiated the union activity he would "kick their ass" and that, if the Union won the election, Respondent would "close the doors." These statements are classic threats of reprisal which are clearly violative of the Act.

The evidence also shows that Supervisor Robert Medford, on several occasions, told at least one employee that Respondent would shut down the plant rather than deal with the union. This again is a classic threat which carries great weight because it was repeated and conformed with a similar threat made by Hall, a high management official.

Supervisor Jim Jenkins repeated the same threat to employee Carney after the latter's conversation with Hall. I do not believe, however, that Jenkins' question of Carney as to where he had been for the past 30 minutes was unlawful. The question was perfectly natural and had no coercive purpose or effect.

Supervisor David Black coercively questioned employee Mark Smith about the August 26 union meeting. I do not believe, however, that the interrogation also created the impression of surveillance, as alleged by the General Counsel.

Finally, Supervisor Tim Hazelwood's conversation with employee Danny Phillips did create the impression of surveillance since he stated that Respondent knew about the union meeting the day before. The clear implication was that Respondent knew Phillips had attended the meeting and that Respondent did not approve of such activity. Moreover, the statement was accompanied by a threat that Shelton would close the plant. The

[6] Hall at first testified that all of the new employees were hired in April 1982, but it was later stipulated that one employee was hired in January.

[7] Respondent alleges that, in the course of the Carney interrogation, Hall specifically disavowed any intention of reprisal. This contention misses the mark. Hall told Carney that he "didn't want to fire anybody. . . . He just wanted to find out what their problem was—you know—why they wanted the union." This does not satisfy the requirement that employees be told that their responses to the interrogations will not result in reprisals. In any event, other circumstances of that particular interrogation carried the indicia of coercion and no such statement was made in the course of the other interrogations.

threat was not isolated because it was repeated by other supervisors, including Hall, a high management official. Employees thus could not view the threat as a simple opinion or an idle thought incapable of being carried out.

Respondent alleges that it cannot be responsible for the unfair labor practices of low level supervisors unless they are specifically authorized. It is undisputed that Jenkins, Black Medford, and Hazelwood were supervisors within Section 2(11) of the Act. And it is clear that an employer is bound by the acts and statements of his supervisors whether specifically authorized or not. See Section 2(13) of the Act.

2. The discriminatory layoffs

The circumstances surrounding the termination of six prounion employees support a finding of discrimination. The termination came on the heels of two union meetings of which Respondent clearly had knowledge, as shown by its interrogation of employees. They also came 1 day after Respondent's receipt of a request by the Union for recognition. The vice president of Respondent received a telephone call notifying him of the Union's request and he refused to accept a similar message addressed to the president of Respondent. Manufacturing Manager Hall learned of the request that very day and he and other supervisors spoke to employees about the union that day and the next day, committing unfair labor practices within 24 hours of the actual terminations. Indeed, the very day of the terminations, Hall threatened to "kick [the] ass[es]" of those who started the union activity. Thus, Respondent's knowledge of the union activity generally, as well as its animus, is well established. The timing of the discharges supports the finding that the discharges came because the Union began its organizing activities and made a bargaining request.

Respondent claims that the termination came about because of economic conditions. This reason, however, does not withstand scrutiny. First of all, a layoff caused by economic conditions would contemplate a probability of recall when conditions improved. In this so-called layoff, the employees were terminated. Indeed, the evidence shows that within 2 weeks Respondent increased its overtime and thereafter transferred employees to fill in where experienced employees had been terminated. Within several months Respondent had to hire seven new employees, thus replacing those employees it had discharged. In many cases it discharged experienced personnel and attempted to operate with more inexperienced and new employees. This is not what would be expected of an employer reacting solely to economic conditions.

Manufacturing Manager Hall testified that, at management meetings in July 1981, he and President Winston Shelton were concerned that "sales were not going quite as well as we anticipated." He testified that sales were declining and "erratic." In a memo dated August 10, 1981, Shelton expressed concern with the "declining sales picture" and a possible buildup of inventory. On August 13, 1981, Shelton sent a memo to Hall asking him to cut production as of September 2, 1981. On August 21, at a management meeting, the possibility of production cutbacks was also discussed. A notation on the minutes for that meeting states "lack of orders after October/people in excess." Hall testified that there was enough work at this point to last until October. Administrative Services Manager Earnest Grayson testified to having participated in the August 21, 1981, discussion. He testified that he did not recall a specific decision other than that "we needed to consider [layoffs] as an option." On August 25, 1981, Shelton wrote a memo to management officials expressing his view that production was going to "substantially overtake sales in the next few weeks." The memo continued, "[u]ntil we can get our new programs instituted, it is essential that we cut back on work force approx 10% and cut out OT [overtime]." Shelton also ordered a further decrease in production.

Hall testified that he took the August 25 memo, which he received on that day or the next, as an order to cut back the work force. However, he did not decide on the six individuals to cut prior to learning of the Union's bargaining request on the morning of August 27. According to Hall, this was "very early in the morning." That same day he spoke to Carney and sought to get information on who was responsible for the union activity. He also decided on the six employees who would be terminated. According to Hall, he left the initial selection to the employees' immediate supervisors and department heads and, upon review, agreed with those selections.[8] That same day Hall sent a memorandum with the names of those selected for termination to Shelton. The memo stated as follows: "Per our discussion at last staff meeting pertaining to declining sales versus production rates, please find attached list of undesirable employees I am in favor of dismissing. I am prepared to discuss with you at your convenience." Apparently that day or the next Hall and Shelton decided to go through with the layoffs.

It is plain, both from the testimony of Hall and of Grayson, that there was no specific decision to lay off employees after the August 21 management meeting. Indeed, even Shelton's August 25 memo does not give any specific date for layoffs. Shelton, of course, did not testify, and the record is silent concerning what was meant in his memo by the reference to "new programs." Apparently the production cutback was necessary only until those new programs were instituted. Moreover, both Hall and Grayson viewed the situation as fluid. Grayson testified that layoffs were considered solely "an option" and Hall testified that Respondent had enough orders to work until October 1981.[9]

The premise upon which Respondent's defense rests is its contention that declining sales justified the layoff of six employees on August 28, 1981. The General Counsel subpoenaed and introduced sales and production records in an attempt to show that there was no economic need for a layoff. Respondent did introduce into evidence a

[8] I have considerable doubts about this point. None of the department heads testified. Uncontradicted testimony indicates employee Smith was told by his supervisor, Hazelwood, that Hall, and not Hazelwood, had selected Smith for termination.

[9] Indeed, Hall did not impress me generally as a credible witness. He seemed evasive when testifying about his conversation with Carney, his knowledge of the Union's bargaining demand, Phillips' leadman status, and the impact of declining sales on the layoff decision. Hall's unreliability affects all of his testimony, including his testimony about the motive for the terminations.

list of its employees from December 1980 through July 1982 which showed a decline in employment after the layoffs. This decline is of little significance because it reflects conditions after the layoff and because, notwithstanding the decline, Respondent hired seven new employees after the layoffs. Respondent refused to produce profit and loss statements in response to a subpoena because, according to its counsel, "the company has never said that it could not afford anything." Thus, Respondent bases its entire defense on declining sales in the period immediately preceding the layoffs.

The sales figures in evidence—based on weekly sales of equipment by some approximately 25 salespersons from the period August 1980 through July 1982—do not support Respondent's position. First of all, they are incomplete. Several crucial periods are missing: the period from March 23 to June 29, 1981; and the weeks of July 27 and August 10 and 24, 1981. Nor do the available figures justify the precipitous cutback of employment which took place on August 28. The sales figures from June 29 through August 17, 1981—6 available weeks—far exceed those from a similar period in 1980 when there were no layoffs and none contemplated so far as the record shows.

Another document submitted by the General Counsel, a so-called sales/production/back order summary prepared by Respondent, confirms the lack of support for Respondent's position. That document lists new orders for all weeks from June through September 4, 1981. It includes figures for the missing weeks in the sales documents discussed above. The summary shows a tremendous amount of new orders during the last 2 weeks in June. It also shows a significant decrease in new orders for the 4 weeks in July. However, it shows a significant increase for all of the weeks in August. Thus, by the time of the terminations, new orders had picked up. The unfilled back orders fluctuated from a low of 222 in June to a high of 625 in early July. The back orders decreased somewhat because of the low level of new orders in July, but the back orders in August were generally higher than they were in June. And it could easily be anticipated that because of increased new orders in August back orders would increase, as they did beginning the week immediately after the layoff.

In these circumstances, Respondent's conclusionary assertions, both through Hall's testimony and the Shelton memos, that declining and erratic sales justified a layoff of the dimensions and character implemented on August 28 are not supported by the record evidence. Respondent's assertions, thus stripped of any substantive support, are clearly insufficient to counter the overwhelming evidence of discriminatory motivation.

Even apart from the sales figures, which, in my view, do not support Respondent's contention that declining sales justified the August 28 layoff of six employees, Respondent's evidence does not refute the evidence of unlawful motivation. Assuming Respondent may have been concerned about a decline in sales in August 1981, it had not specifically decided on layoffs or on the date of such layoffs. This is clear from the testimony of Hall and Grayson, the only management officials who testified in this proceeding. No firm decision had been made prior to receipt of the August 27 bargaining request from the Union. Within the next 2 days, Respondent decided to cut production immediately and to terminate "undesirable" employees rather than to lay them off. Shelton's speech announcing the layoffs did not focus on economic factors. Although he did refer to a decline in sales, according to one of the four employee witnesses, he called the terminations a "spring house cleaning" and stated that the terminated employees were "unsuited" for Respondent and would not be recalled.

Had Respondent's motive for the terminations been solely economic and devoid of any concern about the onset of union activities, it would have considered the possible recall of laid-off employees. Such a recall occurred in March 1982 after a 2-week layoff of all employees. Shelton's August 25 memo contemplated an upswing in the future because he suggested a 10-percent work force cut "until we can get our new programs instituted." Indeed, significant overtime resumed in September despite Shelton's order in his August 25 memo that it be "cut out." Some employees had to be shifted to fill in for some of the terminations and new employees were hired several months later. Respondent tolerated the alleged derelictions of the terminated employees until the Union came on the scene. This fact, together with its need for new employees within the months of the discharges, renders Respondent's decision to rid itself of employees "unsuited" for employment suspect and explainable only by reference to the recent appearance of the Union at the plant.

Respondent's unlawful motive is also confirmed by the fact that on August 27 and 28 the timeframe after receipt of the Union's bargaining request and within which the decision to lay off employees was made, Hall interrogated Carney about union activities and threatened to "kick [the] ass[es]" of those employees who started the union activities. Thus, Respondent's decision to cut its work force and its termination of employees would not have occurred but for the union activities which culminated in a bargaining request received by Respondent on the morning of August 27.

Respondent asserts that it cannot be found to have discriminatorily discharged employees unless it is specifically found to have known of each of their union activities. In the circumstances of this case such a specific finding is unnecessary. Respondent clearly knew of the union activity generally and of the Union's bargaining request. It also reacted to such activity by engaging in unfair labor practices. The well-timed discharges are of the same character, particularly since they are unsupported by declining sales or other economic considerations. Respondent decided on a power play—a mass discharge rather than a layoff—of a group of employees to demonstrate that it would and could meet a union threat with economic force and thereby stifle any union support. See *Majestic Molded Products v. NLRB*, 330 F.2d 603, 606–607 (2d Cir. 1964). See also *NLRB v. Link-Belt Co.*, 311 U.S. 584, 602 (1941).

Moreover, in at least two instances, Respondent had knowledge of the union activity or affiliation of particu-

lar employees. Their inclusion in the mass terminations is further evidence of Respondent's unlawful motivation.

Melcher was an unlikely candidate for termination but for the fact that his father was the business representative of the Union which made the bargaining request the day before the terminations. Melcher was allegedly selected because of his lack of experience, according to Hall's August 27 memorandum to Shelton. Actually, Melcher had started his employment the same day as another employee in the welding department who was not terminated. Business Representative Melcher signed the telegram sent to Respondent and no doubt the telephone message received by Pottinger on the morning of August 27 identified the sender of the telegrams. Hall, of course, knew of the call to Pottinger. The senior Melcher also testified that he called Respondent's office two times after delivery of the telegrams and identified himself. He asked for Shelton but was told he was unavailable.

There is no documentary or testimonial evidence to support any suggestion that Melcher was a poor employee. He received no written warnings about his job performance and his immediate supervisor did not testify. Moreover, after his termination, another employee, Robert Helton, was transferred into the welding department. Helton had no welding experience whatsoever. Melcher had had 2 years of vocational training and had passed his probationary period by receiving a raise just 2 months before his discharge. In these circumstances, and in view of Respondent's knowledge of his father's affiliation with the Union which made the bargaining request and Hall's determination to uncover the employees who started the union activities and to "kick their ass," I find that Melcher would not have been discharged but for his union activities.

Phillips was likewise an unlikely candidate for discharge. He was the most senior employee in the polishing department. Supervisor Hazelwood's confrontation with Phillips after the August 20 union meeting carries the clear implication that Hazelwood knew that Phillips had attended the meeting and that Phillips was a prounion employee. This knowledge is imputed to Respondent.

Phillips was allegedly terminated for absenteeism, but it is obvious that such absenteeism was of no concern to Respondent since, on June 17, just 2 months before he had been promoted to leadman and given a 70-cent-per-hour raise.[10] Moreover, uncontradicted testimony shows that after August 28 Hall twice told Phillips that he would be recalled when work picked up. This refutes any suggestion that Respondent considered Phillips' absenteeism a serious problem. In view of Phillips' outstanding work record, it is inconceivable that he would have been selected for discharge but for the fact that he was known or thought to have been a union supporter.

[10] Phillips' absenteeism after June 17 was not particularly serious or worse than the records of other employees who were not terminated. From June 17 until August 27 Phillips was late on two occasions and had one unexcused absence. He had called in before his August 28 absence but Respondent marked this an unexcused absence on September 1—several days after he was terminated. In contrast, Timothy Krelger and Glen Parrish were placed on probation in July 1981 for absenteeism and they were not selected for termination. Phillips was never put on probation so far as the record shows.

The other four terminated employees likewise had records which were better or at least no worse than other individuals who were not terminated. For example, employee Snelling was allegedly chosen because he had "least lack of experience with equipment and operations," according to Hall's memo of August 27. Snelling's supervisor did not testify, but Snelling had an unblemished record with no warnings or reprimands. Respondent, however, terminated Snelling and kept employee Ron Korb in the same department. Korb had received a warning on August 28—the very day of the terminations—for having run parts improperly both on August 27 and 28. Donald Smith was chosen because of his "unsafe work practices," that is, that he had lost time because of three accidents in 1 year. Smith credibily explained that he had had only one job-related accident. Hall admitted that accidents were common in the electropolishing department and that other employees had lost time because of accidents. Moreover, Smith had received a raise shortly before his termination and he also worked in the polishing department.

Mullens and Logsdon were allegedly selected because of their poor attendance record. Their attendance records, however, were no worse than other employees who were retained. Logsdon was never issued a written warning about absenteeism and he received a raise on August 10, less than 3 weeks before his discharge. Much of Mullens' absenteeism was due to his disability. Both he and Stanley Holt, another employee in the same department, were off work on disability in August. Hall attempted to explain that Holt was not chosen for termination because he called in, whereas Mullens did not. Documentary evidence, however, shows exactly the opposite. Hall also relied on the fact that Mullens had once been placed on probation as a disciplinary matter. However, other employees, two in his department, had been placed on probation after Mullens had, but they were not terminated.

In these circumstances, I find that Respondent would not have discharged employees Melcher, Phillips, Smith, Snelling, Mullens, and Logsdon but for their union activities and Respondent's concern about the onset of the Union and its bargaining request made 1 day before the discharges.

CONCLUSIONS OF LAW

1. By interrogating employees concerning their union activities and those of other employees, by announcing a promise of benefit in order to discourage union activities, by soliciting complaints with the implication that they would be resolved without the need for a union, by threatening reprisals if employees supported or selected a union, and by creating the impression of surveillance of union activities, Respondent has violated Section 8(a)(1) of the Act.

2. By discriminatorily terminating employees Danny Phillips, Dennis Mullens, Mike Logsdon, Donald Smith, Larry Melcher, and Mark Snelling because of the onset of the Union and its bargaining request, Respondent violated Section 8(a)(3) and (1) of the Act.

3. The above violations are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

4. Respondent has not otherwise violated the Act.

5. The challenges to the ballots of employees Phillips, Mullens, Logsdon, Smith, Melcher, and Snelling are overruled and their ballots are to be counted. Thereafter, the Regional Director is to issue a revised tally of ballots and certify the results of the election in Case 9-RC-13890.

THE REMEDY

I shall recommend that Respondent cease and desist from the unfair labor practices found herein. Having found that Respondent unlawfully terminated employees Phillips, Mullens, Logsdon, Smith, Melcher, and Snelling, I shall recommend that it be ordered to offer these employees full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any or all losses of earnings caused by Respondent's unlawful conduct. The amounts due shall be computed as provided in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *Florida Steel Corp.*, 231 NLRB 651 (1977).[11]

Upon the foregoing findings of fact, conclusions of law, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended.

ORDER[12]

The Respondent, Collectramatic, Inc., Louisville, Kentucky, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discharging, disciplining, or otherwise discriminating against employees in regard to their hire or tenure of employment or any term or condition thereof because they engage in union activities or in order to discourage union activities.

(b) Interrogating employees concerning their union activities or those of other employees.

(c) Announcing promises of benefits in order to discourage union activities.

(d) Soliciting complaints with the implication that they would be resolved without the need for a union.

(e) Threatening employees with reprisals if they select or support a union.

(f) Creating the impression that the union activities of employees are under surveillance.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their Section 7 rights under the Labor Act.

2. Take the following affirmative action which is necessary to effectuate the policies of the Act:

(a) Offer to employees Danny Phillips, Dennis Mullens, Mike Logsdon, Donald Smith, Larry Melcher, and Mark Snelling full and immediate reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or other rights and privileges, and make them whole for any loss of earnings or benefits they may have suffered as a result of their unlawful discharges in the manner set forth in the "Remedy" section of this Decision.

(b) Expunge from its files any reference to the discharges of the employees mentioned above and notify them in writing that this has been done and that evidence of their unlawful discharges will not be used as a basis for future personnel actions against them.

(c) Preserve and, upon request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(d) Post at its Louisville, Kentucky, facility copies of the attached notice marked "Appendix."[13] Copies of said notice, on forms provided by the Regional Director for Region 13, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director for Region 9, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

IT IS FURTHER ORDERED that the Regional Director for Region 9 open and count the ballots of employees Phillips, Mullens, Logsdon, Smith, Melcher, and Snelling and issue a revised tally of ballots and certify the results of the election in Case 9-RC-13890.

[11] See generally *Isis Plumbing Co.*, 138 NLRB 716 (1962).

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

[13] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."